Supreme Court, U.S.
FILED
OCT 23 2000
CLERK OF THE COURT

(3)

No. 00-0455

In The

Supreme Court of the United States

WILLIAM M. ACKER, JR. and U. W. CLEMON,

Petitioners,

v.

JEFFERSON COUNTY, ALABAMA,
A political subdivision of the State of Alabama,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Pursuant to Supreme Court Rule 15(6) and (8), petitioners respectfully reply to certain matters raised in respondent's brief and not earlier addressed by petitioners, and address the intervening grant of certiorari in *Hatter v. United States*, No. 99-1978.

The Significance of the Grant of Certiorari in *Hatter v. United States*

On October 16, 2000, this Honorable Court granted the petition of the United States for a writ of certiorari directed to the Federal Circuit, accepting for review *Hatter v. United States*, 64 F.3d 647 (Fed. Cir. 1995). When William M. Acker, Jr. and U. W. Clemon filed their petition for certiorari, and when Jefferson County responded to it, none of them knew what this Court would do in *Hatter*. They still do not know what this Court will do on the merits in *Hatter*, but they are reasonably sure that the Court will speak to the application of Article III's anti-diminution provision to any governmentally enacted diminishment in the compensation of an Article III judge.

Although it is possible to differentiate between *Hatter* and the instant case[1], the fact that *Evans v. Gore*, 253 U.S. 245 (1920), is implicated in both cases suggests that the two cases can be, and should be, looked at contemporaneously.

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[1] The present case presents disparate treatment of different categories of taxpayers; and it involves an entirely new tax enacted after the Petitioners became Article III judges.

Setting the Record Straight

Jefferson County has gone outside the record to provide erroneous, unproven and irrelevant information, and has materially misstated the actual record.

Jefferson County is patently incorrect at page 12 of its brief when it asserts that Petitioners "never raised that issue before any of the lower courts". In this, Jefferson County is referring to the effect on the application of Article III's anti-diminution provision of Ordinance 1120's disparate treatment of different categories of taxpayers. Petitioners see no need to provide chapter and verse in contradiction of this unsupported assertion. Although the issue was ignored by the Eleventh Circuit, it was certainly raised.

Jefferson County is also incorrect at page 12 in asserting that this Court has already addressed the Compensation Clause issue. In the previous visits of this case to this Court, this Court did not address what the Eleventh Circuit had not addressed. Until the case was earlier remanded by this Court to the Eleventh Circuit for an expression from it on the Compensation Clause issue, this Court chose not to address the question about which Justices Holmes, Brandeis and Frankfurter spoke in the dissent in *Evans v. Gore*, 253 U.S. 245 (1920), and in *O'Malley v. Woodrough*, 307 U.S. 277 (1939). These three critics of *Evans v. Gore* argued that Article III judges should not be exempted from income taxes enacted after the judges assume office, that is, **so long as the new taxes are evenly and uniformly applied to the taxpaying public.** Ordinance 1120, by its express terms, is not evenly and uniformly applied. It overtly exempts a great number

of high-end wage earners, many of whom earn more than Petitioners do.

There is nothing in the record upon which to base Jefferson County's bold assertion at pages 2 and 12 that "100% of its wage earners" (apparently, except for Article III judges) are paying its unconstitutional tax pursuant to a corrective state court order entered in *Richards v. Jefferson County*, Case No. CV-92-3191, a case that this court had before it in 1996 in *Richards v. Jefferson County*, 517 U.S. 793 (1996). Not only is this assertion false, but Petitioners sincerely doubt the correctness of the alternative alleged 92 percent payment rate recited at page 2 and in footnote 2 on page 13 of Jefferson County's brief, and mentioned during the earlier oral argument outside the record without the testing that discovery would have accomplished. Assuming, contrary to the true facts, that Article III judges who perform work in Jefferson County are the only persons who are not paying the occupational tax, Jefferson County's reference to state court litigation, especially to decrees entered after Petitioners' case was decided by the United States District Court for the Northern District of Alabama, cannot influence the outcome of this case. If state court litigation surrounding Ordinance 1120 is given any significance whatsoever, Petitioners respectfully point to the fact that Ordinance 1120 has been declared unconstitutional on its face in *Richards v. Jefferson County*.

The Field of Operation of the Compensation Clause

At page 11 of its brief, Jefferson County says that if Ordinance 1120 is held to violate the Compensation

Clause, then the congressional consent to state and local taxation contained in the Public Salary Tax Act, 4 U.S.C. § 111, would "have no field of operation for judges." This contention is necessarily based on Jefferson County's wish that *Evans v. Gore* be pronounced dead and laid to rest. What Jefferson County is really saying is: "There is no longer any 'field of operation' for the Compensation Clause." Petitioners, like the Federal Circuit, respectfully disagree. The erosion of the Compensation Clause, if any has occurred, is not complete. It still says what it says. Its language remains a part of the Constitution. Accordingly, Petitioners make no apology for being in the unique category of citizens who enjoy the protection of the anti-diminution provision of Article III. The Compensation Clause is in the Constitution for a purpose. Congress could not abrogate it by enacting the Public Safety Tax Act even if it had intended so to do. No Article III judges should shrink from enforcing it in the name of public relations. If we do, our Constitution itself is diminished.

No Conflict with *Hatter*?

Jefferson County starts its argument with the assertion that "the decisions in this case and *Hatter v. United States*, 99-1978, are not in conflict . . . " If this is so, why did Jefferson County in its response brief join the United States in asking this Court to grant certiorari in *Hatter*? In so doing, Jefferson County, in effect, filed a brief *amicus curiae* on behalf of the United States in *Hatter* without complying with Supreme Court Rule 37.

Jefferson County previously urged this Court that the issue presented in *Hatter* was worthy of certiorari.

Petitioners, of course, agree with that proposition, in that the same core issue of whether *Evans v. Gore* has continuing vitality is presented here and supports the grant of certiorari in the case at bar.[2]

CONCLUSION

Jefferson County's thinly disguised argument, made from the moment it filed these actions against Petitioners, is that Petitioners' predominant motive in this case is to avoid paying their taxes. Jefferson County apparently succeeded in this argument with the last Eleventh Circuit panel, which held:

> The joint effect of Alabama Act 406, the Public Salary Tax Act, and the Buck Act, was to hang over the compensation of federal judges working in Jefferson County a sword of Damocles (or given that the tax rate ultimately imposed was only *one-half of one percent*, perhaps we should refer to it as a *pen knife of Damocles*).

Jefferson County v. Acker, 210 F.3d 1317, 1322 (11th Cir. 2000) (emphasis added). Such an argument proves too much, for it altogether eliminates the meaning of any right which is vested by the Compensation Clause in a sitting Article III judge. Petitioners respectfully refer the Court to George Washington's letter to his Tory friend,

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[2] Of course, Petitioners also agree with Jefferson County to the extent Jefferson County is understood to mean that the Eleventh Circuit can be reversed by this Court in this case without reversing the Federal Circuit in *Hatter*.

Bryan Fairfax, written not long before the American Revolution. Colonel Washington there addressed the constitutionality of a then very well known tax, as follows:

> For, Sir, what is it we are contending against? Is it against paying the duty of three pence per pound on tea because burdensome? No, it is the Right only we have all along disputed . . . [3]

Petitioners respectfully dispute the **Right** of Jefferson County to impose an income tax upon sitting Article III judges while a great number of taxpayers who earn more money than they do are exempted entirely. An after-the-fact piece of judicial legislation by a state court purporting to remove the fatal exemptions, and now on appeal to the Supreme Court of Alabama, cannot change the law of this case.

The October 16, 2000 grant of certiorari to review *Hatter v. United States*, 64 F.3d 647 (Fed. Cir. 1995) is the strongest of proof that the issue of whether there is continuing vitality in *Evans v. Gore* presents an issue of gravity, concern, and exceptional importance to our three branch system of government. Accordingly, the criteria for the grant of certiorari have been met; and the Court should grant the writ in the present case as a companion case to *Hatter v. United States*, No. 99-1978.

Respectfully submitted,

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[3] *Willard Sterne Randall, "George Washington, A Life"* (Henry Holt & Company, New York, New York 1997), p. 267.